J & J Drainage Products Company *and* The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge No. 83, AFL-CIO. Case 17-CA-10290

24 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 10 June 1982 Administrative Law Judge Rodger B. Holmes issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent had sufficient objective considerations to rebut the presumption of the Union's majority status, we find it unnecessary to consider the judge's reliance on the fact that the Union had been certified 16-1/2 years earlier. In addition, Chairman Dotson and Member Hunter express no opinion as to the successorship issue since no exceptions were filed, and further find it unnecessary to rely on all cases cited by the judge on pp. 16 through 19 of the judge's decision.

DECISION

ROGER B. HOLMES, Administrative Law Judge. Based on an unfair labor practice charge filed on April 10, 1981, by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge No. 83, AFL-CIO, the General Counsel of the Board issued on May 19, 1981, a complaint alleging violations of Section 8(a)(1) and (5) of the Act by J & J Drainage Products Company. The General Counsel's complaint was amended during the early part of the trial proceedings and prior to the presentation of evidence.

The trial was held on January 28 and 29, 1982, at Hutchinson, Kansas.

As a preliminary matter in this decision, there is an issue between the parties as to whether the Respondent's posttrial brief should be accepted. In summary, counsel for the General Counsel takes the position that the Respondent's brief was untimely and that it should not be read or considered in this case. The attorney for the Respondent urges that he relied on the due date reflected in the transcript of the proceedings and that his brief should be accepted as being timely filed.

The subject of the filing of posttrial briefs was discussed at the trial after the parties had concluded their presentation of the evidence. In part, the transcript reflects that my comments were:

> The time for filing of the briefs will be Friday, March 15, 1982. That is the maximum amount of time which I can grant to you under the provisions of Board regulations, so you want to be sure and get your brief into San Francisco before 5:00 p.m. on that date in order for it to be timely received.

In reality, I believe that court reporter made an error in transcribing what was said concerning the due date for posttrial briefs. I believe that I said the due date was Friday, March 5, 1982, whereas the court reporter transcribed it Friday, March 15, 1982. The reasons are: (1) March 5 was a Friday, whereas March 15 was a Monday; (2) March 5 was 35 days from the close of the trial and, thus, as I stated at the trial, that was the maximum amount of time I was authorized to grant to the parties. (See Sec. 102.42 of the Board's Rules and Regulations.) March 15 was 45 days after the close of the trial; (3) March 5 was consistent with the due date reported by me to the clerical staff at the Division of Judges after the close of the trial proceedings.

Counsel for the General Counsel mailed her brief on Wednesday, March 3, 1982, which apparently anticipated delivery by the Postal Service by Friday, March 5, 1982. Actually, the date stamp used by the clerical staff at the Division of Judges shows that the General Counsel's brief was not received until Monday, March 8, 1982.

On Tuesday, March 9, 1982, the attorney for the Respondent filed a request with the Deputy Chief Administrative Law Judge for an extension of time for the filing of briefs from March 15, 1982, to March 25, 1982. On March 11, 1982, counsel for the General Counsel filed a telegraphic opposition to the Respondent's extension of time request on the grounds that the due date for the filing of posttrial briefs was March 5, 1982, and that the Respondent's request was untimely made. On March 12, 1982, the Deputy Chief Administrative Law Judge denied the extension of time request made by the Respondent's attorney. Meanwhile, the Respondent's attorney had mailed his posttrial brief on March 11, 1982. The date stamp used by the clerical staff at the Division of Judges indicates that the Respondent's brief was received on Monday, March 15, 1982. The Respondent's brief was received on Monday, March 15, 1982.

While the Respondent's posttrial brief does not purport to be a reply brief in answer to the arguments made in the General Counsel's posttrial brief, the time sequence in which the briefs were submitted is similar to what the time sequence would have been if a reply brief had been filed by the Respondent. In *Allis-Chalmers*

Corp., 234 NLRB 350 (1978), Administrative Law Judge Robert E. Mullin held at 351, fn. 4:

> Sec[tion] 102.42 of the Board's rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8, as amended) makes no provision for reply briefs. Neither does it prohibit them. Whether such briefs are to be permitted in a specific case appears to lie within the discretion of the Administrative Law Judge. Presumptively, the ruling of the latter must be made with due regard for that other section of the *Rules* which places on the Administrative Law Judge the duty "to inquire fully into the facts." Sec. 102.35 Cf. *Leatherwood Drilling Company*, 180 NLRB 893 (1970).

Viewing the matter of reply briefs as being a discretionary decision, I have rejected reply briefs on at least two occasions. See *International Harvester Co.*, 227 NLRB 85, 88 fn. 1 (1976), and *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436, 438 (1978). However, in different cases some other administrative law judges have accepted reply briefs. See, for example, *Goshen Litho*, 221 NLRB 795, fn. 1 (1975). I also note that the United States Court of Appeals for the Second Circuit directed that the Board consider late-filed exceptions and a supporting brief where the employer in that case apparently was confused as to the due date. See the Board's decision in *Maspeth Trucking Service*, 240 NLRB 1225 (1979).

Under the unusual circumstances presented here, and especially considering the fact the transcript does indicate that the posttrial briefs were due on March 15, 1982, I believe there has been some confusion as to the correct due date. Accordingly, I will accept counsel for the General Counsel's posttrial brief because she had mailed it in time to have reasonably expected her brief would be delivered before what I believe was the correct due date of March 5, 1982. I will also accept the Respondent's posttrial brief because it was mailed in time to be received by what the transcript shows to be the due date. For purposes of this analysis and ruling on the motion to strike, I have treated the Respondent's brief in the same manner as a reply brief which, as indicated above, affords some discretion to the administrative law judge who heard the case.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Board's jurisdiction over the business operations of the Respondent is not in issue in this proceeding. The Respondent is engaged in the manufacture of drainage products at its Hutchinson, Kansas facility. The Respondent's operations meet the Board's direct inflow and direct outflow jurisdictional standards.

The status of the Charging Party as being a labor organization within the meaning of the Act also is not in issue in this case. Such status was stipulated during the trial.

II. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Six persons were called as witnesses to testify during the trial proceedings. In alphabetical order by their last names, they are: Kenneth Cox, who is a machine operator employed by the Respondent; Larry G. Daugherty, who is the assistant business manager and the recording secretary of the Union; J. W. Kelley, who is the president of J & J Holding Company, which owns and manages three other companies, including the Respondent; Betty Pinkston, who is a former employee of the Respondent; Dale Smith, who is the vice president and general manager of the Respondent, and Wayne J. White, who is an employee of the Respondent and who had worked at the Hutchinson facility for over 24 years at the time of the trial.

The findings of fact to be made herein will be based on portions of the testimony from each one of the six witnesses who testified at the trial; on documentary evidence introduced by the parties, and on stipulations which the parties were able to agree upon. Particularly in view of the passage of time between the occurrence of the past events in this case and the time that the witnesses testified at the trial, it is not surprising that there were variations in the recollections of the witnesses when they attempted to relate those past events. Some witnesses were able to remember with greater certainty than other witnesses the things which were said; the dates on which the events occurred, and the sequence of the past events. To take just one example, note the candid testimony of Pinkston about a conversation between Smith and her:

> Q. . . . Would say first conversation occurred very close to the time that you heard about the sale?
>
> A. I don't know. I don't know, because I can't remember, you know, how much time had elapsed in between, but I know I asked—I feel like I went in and asked Mr. Smith one time, about the Union, whether or not there was going to be one, and what was going on, and this is, I feel, is at that time that he told me that the J & J had bought the company, not the Union. Now, I feel like that was at that time, and I am—I don't feel like I am wrong, so I think maybe this was what happened. But my gosh, I don't know. That's been a year ago, and that isn't my life any more, and I haven't got any reason to remember all that.

To avoid any misunderstanding, the foregoing is recited not to suggest any criticism of Pinkston as a witness. On the contrary, it shows candor on her part at the trial.

In contrast, Smith was more certain in his recall of the conversations he had with Pinkston and the dates of those conversations. Kelley's testimony regarding his conversations with Smith and regarding the sequence of events lends support to Smith's account, while Daugherty's testimony regarding his meeting with Kelley and regarding his conversations with Pinkston and Cox conflicts with the sequence of events given by Smith.

In this connection, I have considered certain statements made, after the Union filed the unfair labor practice charge, in the Respondent's "position paper," which was submitted on May 6, 1981, to an agent of Region 17 of the Board. The letter was submitted to the Region on behalf of the Respondent by an attorney who was representing the Respondent at that point in time, but not the attorney who appeared for the Respondent at the trial. (Tr. 458.) The statement of position was received into evidence as General Counsel's Exhibit 15 under the Board's decision in *Steve Aloi Ford, Inc.*, 179 NLRB 229 (1969), and the cases cited in fn. 2 therein. However, I indicated (during the discussion reflected at tr. 459–464) that I would once again read the Board's decision in *Steve Aloi Ford*. Having done so, I adhere to the ruling made at the trial that the Respondent's statement of position was admissible. The Board has applied the *Steve Aloi Ford* holding in subsequent cases. See, for example, the Board's decision in *Bond Press*, 254 NLRB 1227 (1981), where the statements of position were held to be admissible although, in that particular case, it was not necessary for the Board to rely on them.

In the present case, the statement of position by the Respondent does assert that Daugherty had spoken with Pinkston "on or about the 27th of February, 1981," with regard to holding a meeting with employees in Hutchinson, and that Pinkston had told him the employees were no longer interested in the Union, and further it was unnecessary for him to travel to Hutchinson. (See G.C. Exh. 15.) Insofar as the date of their conversation is concerned, the Respondent's statement lends support to Daugherty's testimony that the conversation was on February 27, 1981. The statement of position does not assert what date Pinkston spoke with Smith, or even that such a conversation took place between those two persons. However, as related at the trial, the contents of the conversation between Pinkston and Smith disclosed that the conversation between Pinkston and Daugherty had already taken place. Nevertheless, after considering all of the foregoing, I found persuasive Smith's testimony on this point that he spoke with Pinkston on February 23 or 24, 1981, with regard to the conversation in question, and then again on February 27, 1981. Accordingly, I have based the findings of fact on this matter on his version. (See sec. 5 and 7 herein.)

In weighing the testimony from all the witnesses, I have considered whether the record shows the basis for the witness' knowledge concerning the matters about which the witness testified. Of course, the occupation of each witness has been a factor to consider in determining whether the witness is identified with one of the parties to the case and whether the witness would likely have an interest in the outcome of the litigation. In addition, I have considered whether a witness' testimony is consistent or inconsistent with the accounts from other witnesses and with documentary evidence. Having examined all the foregoing criteria, I have based the findings of fact to be set forth herein on the portions of the testimony from each witness which appear to me to be the credible, accurate, and reliable portions of their accounts of the past events.

II. SEQUENCE OF EVENTS

1. The events prior to February 1981

Introduced into evidence as General Counsel's Exhibit 11 was a copy of a Certification of Representative in Case 17–RC–4567, which had been issued on September 28, 1964, on behalf of the Board by the Regional Director for Region 17 of the Board. The certification was issued to the International union of the Charging Party. The employer listed on the document was Eaton Metal Products Corporation (Kansas Division). The unit description was:

> All production and maintenance employees of the employer's Hutchinson, Kansas, plant, including truck drivers and plant janitor, but excluding salesmen, office clerical employees, office janitor, guards, professional employees, and supervisors as defined in the Act.

According to employee White and union assistant business manager Daugherty, the Union had been recognized as the collective-bargaining representative of the unit employees at the Hutchinson facility from its certification in 1964 through February 20, 1981. According to Plant Manger Smith, it was in 1974 that Allied Products Corporation acquired Eaton Metal Products and began operating the Hutchinson facility. The most recent collective-bargaining agreement at the Hutchinson plant was between Bush/Hog Eaton, a subsidiary of Allied Products Corporation and the Charging Party union. (See G.C. Exh. 7.) The effective dates of that agreement are from February 25, 1980, to February 24, 1983. (See art. 26, sec. B of G.C. Exh. 7.)

Prior to the negotiations for that last collective-bargaining agreement, the Union had held a meeting on January 23, 1980, to explore suggestions for the Union's contract proposals. A notice dated January 18, 1980, and addressed "To all members and employees of Eaton Metal Works" was posted at the facility. (See G.C. Exh. 12.) A "sign-in-sheet" was available at the union meeting location for persons in attendance to sign. There are 12 names on the sheet. (See G.C. Exh. 13.) Daugherty explained at the trial that all the persons who attended that meeting were not union members, and that the meeting was open to all unit employees. He estimated that there were approximately 10 persons who paid union dues in January 1980. There were 39 employees in the unit as of January 14, 1980. (See G.C. Exh. 14.) The collective-bargaining agreement contains a union dues-deduction clause. (See art. 24 of G.C. Exh. 7.)

Kenneth Cox was the chief union steward at the Hutchinson facility, and Betty Pinkston also was a union steward.

According to Smith, who was the plant manager for Allied, his former employer was engaged at Hutchinson in "manufacturing of corrugated steel pipe, manufacturing of metal end sections, and some finish work on farm line products, and marketing of this product in Kansas, and Colorado, and part of Oklahoma." With regard to what was known as the farm line products, Smith explained at the trial that the Hutchinson facility under

Allied performed "the finish work [which] was the final forming of the side wall sheets, and this would be on grain bins, on bulk feed bins, on what they market as a handi-hut, which is a small farm building."

2. The events on February 17, 1981

Introduced into evidence as General Counsel's Exhibit 2 was a copy of the purchase agreement between Allied and the Respondent dated February 17, 1981. The agreement provided for the Respondent to acquire certain assets which "have been used by the Eaton Division in the manufacture and sale of riveted corrugated steel highway culverts and related products at Hutchinson, Kansas." The "acquired assets" purchased by the Respondent included:

> *Acquired Assets.* Subject to the terms and conditions hereinafter set forth, Seller agrees to sell, assign, transfer, convey and deliver to Buyer, and Buyer agrees to purchase from Seller, as of the close of business on February 20, 1981 (the "Closing Date"), the following assets and properties of Seller (the "Acquired Assets"):
>
> (a) Certain real estate and improvements thereon located in Hutchinson, Kansas (the "Hutchinson Facility") as more particularly described in the real estate contract to be executed by the parties hereto in substantially the form attached hereto as Exhibit A (the "Real Estate Contract").
>
> (b) All inventories of finished goods (including goods on consignment, if any) work-in-process, raw materials and purchased parts located at Hutchinson, Kansas (collectively, the "Inventory") relating to the Culvert Products. It is agreed that the term Inventory shall include Spirol culvert products located at Hutchinson, but shall not include any farm products such as grain bins and components or parts related thereto which may be located at the Hutchinson Facility.
>
> (c) The machinery and equipment and furniture (collectively, the "Machinery"), substantially as set forth in Exhibit B, together with all jigs, fixtures, tooling and miscellaneous equipment relating to the manufacturing of the Culvert Products located at the Hutchinson Facility.
>
> (d) All contracts and purchase orders for Culvert Products received by the Eaton Division, or parts and services of similar items relating thereto, to the extent performance thereof by the Eaton Division has not been completed on or prior to the Closing Date.
>
> (e) All assignable warranties of any sort issued by third parties to Seller or which relate to the Acquired Assets.
>
> (f) All of Seller's right, title and interest in certain Agreements, substantially as set forth on Exhibit C.
>
> (g) Subject to to the provisions of Pargagraph 15, all of Seller's right, title and interest in and to the name Eaton, as a trade name utilized in the manufacture and sale of Culvert Products.

The "definitive version" of attachment C to General Counsel's Exhibit 2 was introduced into evidence as General Counsel's Exhibit 4.

Introduced into evidence as General Counsel's Exhibit 3 was a copy of the bill of sale of certain machinery, equipment, and furniture, as described therein, from Allied to the Respondent.

3. The events on February 20, 1981

On Friday, February 20, 1981, chief union steward Cox met briefly at 9:30 a.m. in Plant Manager Smith's office with a representative of Allied. Cox believed that the Allied representative was from Chicago, but Cox was not able to recall the person's name at the trial. Just Cox and the Allied representative were present during the conversation. Cox testified, ". . . he informed me that Allied was selling out, and that J & J Drainage was the buyers. And he informed me that as of that date, February 20, 1981, that the Union was ended."

After the morning break ended at 9:40 a.m. on February 20, 1981, a meeting was held at the Hutchinson facility. Present was the employees of Allied; Plant Manager Smith; Plant Superintendent Alton J. Neill; Respondent President Kelley, and the representative of Allied who Cox believed was from Chicago. The meeting lasted for approximately 20 minutes. During that meeting, Kelley was introduced to the employees of Allied, and Kelley spoke to them. Cox testified, "Well, he said that he had bought the J & J Drainage, and that Monday morning, everyone was to come back to be hired, and he also stated that the pay raise that the Union had going in effect February 25, would go in effect Monday morning, February 23, 1981."

During that meeting, Kelley was asked about union representation. According to Kelley, he responded, "That is strictly up to the majority of you people." Kelley added, "At our other operations, they expect me to take care of their needs. If you feel you want the Union, then it's up to the majority of you people."

4. The events on February 23, 1981

Introduced into evidence as General Counsel's Exhibit 5 was a list of all of the unit employees employed by the Respondent on February 23, 1981, at the Hutchinson facility. (See the stipulations at Tr. 32–34.) All of the individuals named on General Counsel's Exhibit 5 had been previously employed by Allied on February 20, 1981, at the Hutchinson facility. Except for one person, the Respondent hired on February 23, 1981, all of the unit employees previously employed by Allied at Hutchinson. Thus, there were 32 unit employees as of February 23, 1981.

Pinkston pointed out at the trial that there were no "new employees" on February 23, 1981, who had not worked for Allied at Hutchinson. When she came to the plant on that first day of the Respondent's operations, Pinkston performed her work "just like normal." However, she later was laid off on March 13, 1981. She had been one of the three Allied employees directly involved in the finishing work on the farm line products, which had been performed by Allied at Hutchinson. The other

two Allied employees were Jeff Flynn and Martha John. Both Flynn and John were transferred to other jobs at the Hutchinson plant, but Pinkston was laid off because she was under doctor's orders to perform only "light duties."

Cox said that his job did not change on February 23, 1981, when the Respondent began operations at Hutchinson. Cox used the same equipment at the plant to produce the same products. He worked the same hours and under the same supervisor. He filled out an employment application during the morning of February 23, 1981, after he had begun working that day. The employees were called in alphabetical order by Personnel Manager Burdick to fill out their applications.

Because White was on the road for Allied on February 20, 1981, he was not informed until February 23, 1981, that the Respondent had begun operations at the Hutchinson facility. At that time, Plant Superintendent Neill told White that Allied had sold the facility and that White could go to work for the Respondent if he wanted to do so. White testified, "Well, he said I could continue with my job just as always." Neill also told White that the Respondent would start paying on that Monday the wage increase which had been scheduled by Allied to go into effect on Wednesday of that week. White was dispatched on a truck that day, and later he filled out an employment application for the Respondent. White stated at the trial that Allied had leased trucks, whereas the Respondent purchased its own trucks.

According to chief union steward Cox, there were six union members at the Hutchinson facility at that time, but two of those were not required to pay union dues because of their union positions. Those two persons were Cox and Pinkston. At the trial, Smith said he was aware that only four employees were having union dues deducted from their wages. It was stipulated at the trial that Kansas is a "right-to-work" State. (See Tr. 144.)

Introduced into evidence as General Counsel's Exhibit 6 was a list of the salaried persons who were employed by the Respondent at the Hutchinson facility on February 23, 1981. It was stipulated at the trial that all those persons had been employed by Allied at the Hutchinson facility on February 20, 1981. (See Tr. 34–35.) Smith, who had been the plant manager for Allied at Hutchinson, became the vice president and general manager for the Respondent at Hutchinson. Neill, who had been the plant superintendent for Allied at Hutchinson, continued to be the plant superintendent at the Hutchinson facility after the Respondent began operations there. Paul Burdick, who had been the personnel manager for Allied at Hutchinson, continued to be the personnel manager for the Respondent at Hutchinson, but later on, Burdick left Respondent's employ when the position was eliminated.

According to Kelley, the "main objective" of the Respondent's purchase of the assets of Allied at the Hutchinson facility was to obtain Allied's equipment to produce metal end sections. In some geographical areas, metal end sections are referred to as "flared ends," which are attached to corrugated steel pipe.

The Respondent was not interested in performing the fabricating work on the farm line products, which Allied had manufactured at Allied's Omaha, Nebraska facility and shipped to Allied's Hutchinson plant for the finishing work on those products. Kelley said that, within a couple of weeks after the Respondent began operations at Hutchinson, the Respondent had cleaned out the inventory of the farm line products and shipped the equipment to Allied in Omaha. As indicated above, Pinkston was laid off as a result of the discontinuance of the finishing work on the farm line products and because of her inability to perform other than "light duties." As indicated previously, the other two employees directly involved with the farm line products at Hutchinson were transferred to other jobs in the Hutchinson plant.

Introduced into evidence as Respondent's Exhibit 2 was a document prepared by Smith during the week of the trial from Allied's profit and loss statements for the years 1977, 1978, 1979, and 1980. The document compares for that 4-1/2 year period the marketing figures for the "products included in Bush Hog/Eaton total sales which are now marketed by J & J Drainage Products" with marketing figures for "products included in Bush Hog/Eaton total sales which were moved from Hutchinson facility." The document indicates that 53 percent of the total sales during those 4 years were in the former category, whereas 47 percent of the total sales were in the latter category. At the trial, Smith acknowledged that the sales figures included the farm line products which had been manufactured by Allied at Allied's Omaha facility and then shipped to Allied's Hutchinson facility where only finishing work had been done.

The Respondent was given a record of Allied's customer accounts, insofar as metal end sections were concerned, at the time that the Respondent began operations at Hutchinson. Through his efforts, Kelley was able to regain Wheeling Corrugating Company and Coldwell Culvert as customers for metal end sections produced by the Respondent at the Hutchinson facility. Kelley explained, "They were new in the sense that it had been some time since they had bought from Bush Hog, because they had been buying from this competitor." Kelley believed there were others, but he could not recall them at the trial.

According to White, all of the regular customers to whom White has delivered products since the Respondent began operations at the Hutchinson facility were customers of Allied.

5. The conversation on February 23 or 24, 1981

On either February 23 or 24, 1981, Smith had a conversation with Pinkston in the culvert shop at the Hutchinson facility. Smith testified, "I had asked Mrs. Pinkston, just in general conversation, how things were going, and she indicated to me that Mr. Daugherty had called her and had indicated that he would like to arrange a meeting in Hutchinson so he could visit with the people, and that she had told him that it really wasn't necessary because the people were not interested in the Union."

Pinkston recalled that "We talked about the plant, and the people in the plant, and the interest of the Union." With regard to the Hutchinson employees, Pinkston had formed the opinion "they want the benefits but they

don't want to pay for them." At the trial, she explained that she had talked with various employees during January and February 1981 at the plant. She did not recall how many employees spoke with her, but she stated, "I would say probably most of them, most everyone that was there, at one time or another, I visited with them." Her conclusion expressed at the trial was that the employees were interested in the wages and benefits contained in the collective-bargaining agreement, but the employees were not willing to pay union dues. Pinkston testified, ". . . well, really, what people seemed to me like they're doing, the Union was real neat for everybody, and got them overtime, got them this and that, and something else, but when they got all the benefits, then they decided now that we have them, we are going to get out of the Union, and we are not going to pay our Union dues any more, and we will just ride on the free sled."

On the same day as his conversation with Pinkston, Smith also had a conversation regarding the above with Kelley. They usually spoke on the telephone each day during that time period on other matters. With regard to his conversation that day with Pinkston, Smith said that he told Kelley "That the Union Business Manager had called and talked to her as the steward, and wanted to arrange a meeting in Hutchinson, and that she had told him that the members, or the majority of the people were not interested in the Union."

6. The conversation between Daugherty and Kelley on February 25, 1981

On February 25, 1981, Daugherty and Kelley had a conversation in Kelley's office at Paola, Kansas. Just those two persons were present during that conversation. Daugherty testified:

> Well, first, I introduced myself, and who I was from, and who I worked for, and requested—told Mr. Kelly that the Local 83 had a Collective-Bargaining Agreement with—had had one with Allied Products, and made a request that J & J recognize our agreement, and he told me at this time, he says, "There's no successorship in that contract, and that Allied terminated all of their employees on February 20, and we gave the employees the option of coming back to work for us on February 23, if they so chose."
>
> We talked some about the—one of the operations, and he told me that it would be primarily an operation like that, the Paola, was mostly drainage pipe, culvert part of it, and the grain bin of the business, would be eliminated, of whatever that was at the other facility, and that's about the extent of our conversation. I don't recall anything else.

Kelley recalled at the trial that he told Daugherty that he did not feel that the people in Hutchinson were interested in being represented by Daugherty. Kelley said that he told Daugherty that he had been informed by the general counsel of Allied that the contract was not a part of the deal with him, and that there was no successorship clause in the contract. At the trial, Kelley acknowledged that he was aware that there was a union contract at the Hutchinson facility at the time that the Respondent bought the assets there, but Kelley testified, "I was told they represented six people." Kelley also said that, prior to his conversation with Daugherty, he had been informed by Allied that there were only four employees who were having union dues withheld from their wages.

7. The conversation between Pinkston and Smith on February 27, 1981

After the Respondent had begun operations at the Hutchinson facility, Pinkston was asked by several employees as to whether there was going to be a union at the plant. As a result of those conversations, Pinkston again spoke with Smith. Smith testified, "On Friday, February 27, in my office, Mrs. Pinkston came in and said—told me [that] she had been getting a number of questions from people in the plant about the status of the Union. And she wondered if I could clarify or say anything about it, and I told her it was really up to the people what happened to the Union, and she asked me if it was possible that they could buy the company and not buy the Union, and I told her that I didn't know."

Either on February 27, 1981, or the following Monday, March 2, 1981, Smith related to Kelley the substance of his conversation with Pinkston. During the first few weeks of the Respondent's operation of the Hutchinson facility, Kelley had additional conversations with Smith in which Kelley asked Smith if there was any union activity at the facility.

8. The union meeting held on March 4, 1981

Daugherty contacted both Cox and Pinkston with regard to arranging a union meeting for the employees in Hutchinson. Daugherty said, "I had called Kenny and Betty, and told them to tell the people, to invite them" Unlike the union meeting held in January 1980, Daugherty said that he did not have an opportunity to post a notice of the meeting at the plant.

Cox said that he made an effort to invite other employees to attend the union meeting, Cox said, "Some of them said they would try to make it, and some of them said they had other plans." Cox was the only employee who attended the meeting. Daugherty testified with regard to Cox, "He said the—basically the same thing that Betty said, that the people just don't seem interested."

At the trial, Cox related that he talked with employees after the Respondent began operations at Hutchinson. Cox expressed at the trial his conclusion, "Well, I just feel they may have not really wanted the Union. They just didn't want to pay the dues, and I think, mainly, was the reason. That of the dues, having to pay the dues."

No other union meetings were held.

9. The letter dated March 19, 1981, from the Union to the Respondent

By letter dated March 19, 1981, the Union made a formal demand on the Respondent for recognition and also a request for collective-bargaining negotiations. (See G.C. Exh. 9.) In part, the Union's letter stated:

Boilermakers Lodge 83 was the certified collective bargaining representative for employees in the appropriate collective bargaining unit at your newly acquired facility in Hutchinson, Kansas. This letter is a formal demand for recognition and a request to bargain collectively on behalf of your employees at the Hutchinson facility. Such demand for recognition is made pursuant to our status as collective bargaining representative as established by the National Labor Relations Board. Any unilateral changes you make concerning the terms or conditions of employment for the unit employees at the Hutchinson facility from the receipt of this letter shall be deemed a breach of your bargaining obligation. I am available to meet with you at a mutually convenient time to negotiate. I am available to meet on the following dates: March 26, 1981, March 27, 1981, April 2, 1981. If these dates are not convenient for you please let me know what dates would be.

Please contact me at your earliest convenience to set a meeting. I am looking forward to hearing from you.

10. The letter dated April 3, 1981, from the Respondent to the Union

By letter dated April 3, 1981, the Respondent replied to the Union's letter of March 19, 1981. (See G.C. Exh. 10.) In part, the Respondent's letter stated:

It is my understanding that Boilermakers Lodge 83 was the collective bargaining representative for some of the employees for Bush Hog/Eaton's operation in Hutchinson, Kansas.

As I explained to you when you were in my office, Allied Products Corporation terminated all Bush Hog/Eaton employees at the Hutchinson, Kansas facility. On the same date, J & J Drainage Products Company bought from Allied part of the fixed assets and part of the inventory located at Hutchinson. As of February 23, 1981, J & J Drainage Products Company did hire most of the people Allied had terminated.

To my knowledge, the employees at J & J Drainage Products Company have not requested you to represent them in any way.

11. Subsequent events after the Respondent's refusals to recognize the Union

On April 30, 1981, Smith had a conversation with Plant Superintendent Neill in Smith's office. Neill reported to Smith that Cox had told him that Cox had told Daugherty that the people were not interested in the Union. Neill also reported to Smith that Cox told him that a union meeting had been held during the first part of March, and that Cox was the only one who attended. (The foregoing was not received for the truth of the matter asserted by the out-of-court declarant. See the discussion at Tr. 439–446. However, also note the findings in sec. 8 herein.)

As a result of his conversation with Neill, Smith informed Kelley by letter of the conversation Smith had with Neill.

By June 1981, the Respondent had 33 employees. Kelley said that two or three employees had quit working for the Respondent, and that the Respondent had laid off four or five employees from work.

IV. CONCLUSIONS

1. As to successorship

The United States Supreme Court held in *NLRB v. Burns Security Services*, 406 U.S. 272, 279 (1972), "It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer."

In its decision in *Saks Fifth Avenue*, 247 NLRB 1047, 1050–51 (1980), the Board stated:

> The Board has held that, in determining successorship, the keystone is whether there is substantial continuity of the employing industry.[6] Continuity of the employing industry requires consideration of the work done . . . as well as consideration of the work force . . . .

[6] *Miami Industrial Trucks, Inc.*, 221 NLRB 1223 (1975), where the Board recognized a successorship to a portion of the predecessor's operation, to wit, one product line with the successor continuing to service it for the same customers employing four service employees, three of whom were employees of the predecessor. See also *Mondovi Foods Corporation*, 235 NLRB 1080, fn. 8 (1978).

Without repeating here the findings of fact which have been set forth previously, I conclude that the evidence shows that there was continuity in the employing industry when the Respondent began its operation of the Hutchinson facility on February 23, 1981. I find the following factors to be persuasive; (1) the Respondent commenced its operations at the same facility and location as Allied had occupied; (2) the Respondent employed the same unit employees, with one exception, as Allied had employed; (3) the Respondent had the same plant management and supervisors as Allied had; (4) there was no hiatus in plant operations because Allied ceased operations on Friday and the Respondent commenced operations on Monday; (5) the Respondent utilized the same equipment, except for the farm products line, as Allied had used; (6) the Respondent manufactured substantially the same products, except for the finishing work on the farm products line, as Allied had manufactured at the facility; and (7) the Respondent served substantially the same customers as Allied had previously served.

The discontinuance of the finishing work on the farm products line affected only 3 unit employees out of 32 employees. Two of these three employees were transferred to other jobs in the plant. The evidence shows that Pinkston was laid off from work not just because of the discontinuance of the farm products line, but also because her doctor had restricted her to performing "light duties." In these circumstances, the discontinuance of the finishing work had relatively little effect on the unit em-

ployees. Furthermore, I find persuasive counsel for the General Counsel's argument with regard to the figures shown on Respondent's Exhibit 2. The exhibit reflects the total value of the farm products line, rather than just the finishing work which had been performed at the Hutchinson facility. The evidence seems clear that the farm products were manufactured by Allied elsewhere and sent to the Hutchinson facility only for finishing work.

After considering all of the foregoing, I conclude that the evidence establishes that the Respondent is a successor employer. See the Board's decision in *First Food Ventures*, 229 NLRB 1228 (1977).

2. Continuing majority status

Having concluded that the Respondent is a successor employer, I turn now to the issues raised by the Respondent's refusal to recognize the Union as the collective-bargaining representative of the unit employees. In this connection, it is helpful to study the Board's decision in *Pennco, Inc.*, 250 NLRB 716 (1980), where the Board stated at 716–717:

> . . . absent unusual circumstances, a union is irrebutably presumed to enjoy majority status during the first year following its certification.[2] Upon expiration of the certification year, the presumption of majority status continues but becomes rebuttable.[3] An employer who wishes to withdraw recognition from a certified union after a year may rebut the presumption in one of two ways; (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority support, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.[4]
>
> The presumption of continuing majority status essentially serves two important functions of Federal labor policy. First, it promotes continuity in bargaining relationships. Thus, section 9 of the Act gives the Board authority to supervise elections and to certify as the exclusive collective-bargaining representative a labor organization which wins an election and "inherent in any sucessful administration of such a system is some measure of permanence in the results. . . ."[5] The resulting industrial stability remains a primary objective of the Wagner Act and to an even greater extent, the Taft-Hartley Act.[6] Second, the presumption of continuing majority status protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and to prevent an employer from impairing that right without some objective evidence that the representative the employees have designated no longer enjoys majority support.
>
> As set forth above, the employer after the certification year may rebut the presumption of majority status with less than actual proof that a union lacks majority support by establishing objective evidence forming a reasonable basis for a good-faith doubt of that status. However, in light of the dual policies underlying the presumption, the employer's burden is a heavy one. Thus, "it is insufficient . . . that the employer merely intuits nonsupport,"[7] and good-faith doubt "may not depend solely on unfounded speculation or a subjective state of mind."[8]

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[2] *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 98–104 (1954).

[3] *J. Ray McDermott & Co., Inc.* v. *N.L.R.B.*, 571 F.2d 850 (5th Cir. 1978), enfg. 233 NLRB 1087 (1978); *N.L.R.B.* v. *Windham Community Memorial Hospital and Hotel Hospital Corporation*, 577 F.2d 805 (2d Cir. 1978), enfg. 230 NLRB 1070 (1977); *N.L.R.B.* v. *Frick Company*, 423 F.2d 1327 (3d Cir. 1970), enfg. 175 NLRB 233 (1969); and *Celanese Corporation of America*, 95 NLRB 664 (1951), cited with approval in *Ray Brooks* v. *NLRB*, supra.

[4] *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486 (2d Cir. 1975), enfg. 210 NLRB 443 (1974); *Allied Industrial Workers, AFL–CIO, Local Union No. 289 [Cavalier Division of Seeburg Corporation]* v. *NLRB*, 476 F.2d 868 (D.C. Cir. 1973), enfg. 192 NLRB 290 (1971); *Terrell Machine Company* v. *N.L.R.B.*, 427 F.2d 1088 (4th Cir. 1970), enfg. 173 NLRB 1480 (1969).

[5] *N.L.R.B.* v. *Century Oxford Mfg. Corporation*, 140 F.2d 541, 542 (2d Cir. 1944), enfg. 47 NLRB 835 (1943).

[6] *N.L.R.B.* v. *Brooks*, 204 F.2d 899 (9th Cir. 1953), enfg. 98 NLRB 976 (1952), affd. *J. Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954).

[7] *Ray McDermott and Co., Inc.* v. *NLRB, supra* at 859.

[8] *N.L.R.B.* v. *Gulfmont Hotel Company*, 362 F.2d 588 (5th Cir. 1966), enfg. 147 NLRB 997 (1964).

With the foregoing guidance from the Board in mind, the legal principles summarized by the Board will be applied to the facts presented in this case. First of all, it is clear in this case that the certification year had expired long ago. In fact, about 16-1/2 years had elapsed between the certification of the Union on September 28, 1964, as the collective-bargaining representative of certain employees of the predecessor employer, and the refusals by the Respondent as a successor employer to recognize the Union. Thus, the presumption of the Union's majority status arising from the Union's certification and the Union's subsequent collective-bargaining agreement with the predecessor employer is a rebuttable presumption.

As indicated in the Board's decision quoted above, an employer may rebut the presumption in two different ways. As to the first method, I conclude that the evidence has not established that the Union did not, in fact, enjoy majority support among the unit employees at the time of the Respondent's refusals to recognize the Union. While it is clear in this case that the Union had only 6 members out of a unit of 32 employees, the Board has drawn a distinction between union membership and employee support of a union. In *Wald Transfer & Storage Co.*, 218 NLRB 592 (1975), the Board held:

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the

Union may not choose to give it their financial support *or* participate as members.[3]

[3] See *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), cert. denied 398 U.S. 929; *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588, 592 (C.A. 5, 1966).

The Board stated in its decision in *Hotel & Restaurant Employers Bargaining Assn. of Pocatello, Idaho*, 213 NLRB 651, 652 (1974):

> Similarly, the Board, with court approval, has held that a showing that less than a majority of the employees in the unit are members of the union is not the equivalent of showing lack of majority support. The reason is substantially the same as that regarding the checkoff figures, namely, that no one can know how many employees who favor union representation do not become or remain members of the Union.

Thus, while the evidence regarding union membership and the other matters to be discussed herein do not establish the first method for rebutting the Union's presumption of majority status, I conclude that such factors may be considered in analyzing the second method, i.e., "(2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain." *Pennco*, supra, 250 NLRB at 716. At first, this may appear to be an inconsistent approach; that is, suggesting that evidence which fails to establish the first test may still be urged by the Respondent to meet the second test for rebutting the presumption of the union's majority status. However, the reason that such an approach does not appear to be inconsistent is that the two tests, or two methods, are different. The first method deals with establishing a fact, whereas the second method pertains to "a sufficient objective basis for a reasonable doubt." Therefore, I conclude that the Respondent here is not precluded from relying upon its knowledge that only 6 out of the 32 unit employees were union members as one factor to support the Respondent's claim that it had a reasonable doubt of the Union's majority status.

Another basis urged by the Respondent is the statement from union steward Pinkston that the employees were not interested in the Union. The fact that Pinkston was one of the two union stewards at the plant, and the fact that the unit was relatively small with 32 employees, both are matters which would warrant giving Pinkston's comment more weight. Thus, I conclude that this situation is different from the one in *Golden State Habilitation Center*, 224 NLRB 1618 (1976), where the Board held at 1619–1620:

> The employee statements are some indication of employee dissatisfaction. However, they are entitled to little weight to the extent they purport to convey the sentiments of employees other than themselves. Otherwise, a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority. Since those who expressed antiunion sentiments were few in number, we conclude that Respondent could not rely heavily on these expressions in refusing to bargain.

While Pinkston's comment to management does not establish proof of the first method for rebutting the Union's majority status, I conclude that the Respondent may rely on her statement in support of the Respondent's reasonable doubt. With regard to the Respondent's reoffering of the evidence regarding statements made by employees to a union steward as being an exception to the hearsay rule based on a "present sense impression" (Tr. 365–368), see the Board's discussion of that exception to the hearsay rule in its decision in *Cumberland Farms Dairy*, 258 NLRB 900 fn. 1 (1981). With the Board's discussion of that exception to the hearsay rule in mind, I conclude that the exception is not applicable to the evidence being offered here.

Significantly, there are no other unfair labor practices alleged to have occurred during the period of time that the Respondent refused to recognize the union. Thus, the Respondent has asserted its reasonable doubt of the union's majority status in a context which is free of unfair labor practices.

The matters which are described in section 11 herein took place subsequent to the Respondent's two refusals to recognize the Union and, therefore, I conclude that those matters cannot be relied on as objective bases for the Respondent's earlier decisions because they came to the Respondent's knowledge after the fact. Although the union meeting occurred on March 4, 1981, which was prior to the Respondent's second refusal to recognize the union, I conclude that the evidence does not prove that the Respondent had knowledge prior to its April 3, 1981 letter to the Union that only Cox had attended the union meeting.

In summary, I conclude that the Respondent has rebutted the presumption of the Union's majority status at the times of the Respondent's two refusals to recognize the Union by the following objective bases for the Respondent's reasonable doubt: (1) the fact that the certification of the Union had occurred 16-1/2 years ago in a unit of the predecessor's employees; (2) the fact that only 6 out of the 32 unit empoyees were union members; (3) the comments made to the Respondent by union steward Pinkston; and (4) the fact that the foregoing occurred in a context free of any unfair labor practices by the Respondent.

In view of the foregoing, I conclude that a preponderance of the evidence does not support the General Counsel's complaint allegations, and that I must recommend to the Board that the General Counsel's complaint be dismissed.

Conclusions of Law

1. The Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a successor employer to the business at the Hutchinson, Kansas facility formerly operated

by Bush Hog/Eaton, a subsidiary of Allied Products Corporation.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent has not engaged in the unfair labor practices alleged in the General Counsel's complaint in this proceeding for the reasons which have been set forth above.

On the basis of the foregoing findings of fact and conclusions of law and on the entire record in this proceeding, I issue the following recommended[1]

ORDER

It is hereby ordered that the complaint in this proceeding be dismissed in its entirety.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.